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HOLLOW TROPES: FRESH PERSPECTIVES ON COURTS, POLITICS, AND INEQUALITY

Tomiko Brown-Nagin*

Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark* (Oxford U. Press 2010). Pp. 320. \$24.95.

Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton U. Press 2007). Pp. 224. \$28.95.

Julie Novkov, *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954* (U. Mich. Press 2008). Pp. 368. \$28.95.

In April, 2010, the *New York Times* reported that President Obama had “spoken disparagingly about liberal victories before the U.S. Supreme Court in the 1960s and the 1970s.”¹ Obama remarked that activist, liberal judges of that era, like activist conservative judges today, “ignored the will of Congress, ignored democratic processes, and tried to impose judicial solutions on problems instead of letting the process work itself through politically.”² The President uttered these remarks against the backdrop of a Roberts’ Court campaign finance ruling that ended restrictions on corporate spending in elections³ - a decision that Obama publicly rebuked at a State of the Union address.⁴ Although some commentators expressed surprise at Obama’s remarks, he had expressed a similar sentiment in a campaign book when he wrote, “[i]n our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy.”⁵

The sentiments of the President, a former professor of constitutional law, also

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1. Charlie Savage & Sheryl Gay Stolberg, *Obama Says Liberal Courts May Have Overreached*, N.Y. Times A15 (Apr. 30, 2010).

2. *Id.* Many commentators interpreted the President’s remarks as an endorsement of “judicial restraint.” They understood Obama to imply that the precedents rendered by the “Warren and Burger courts - which expanded criminal defendant rights, required busing to desegregate schools and declared a right to abortion - . . . were dubious.” *Id.* See also Robert Barnes, *Recent High Court Cases Revive Debate on Judicial Activism*, Wash. Post A13 (May 3, 2010); Geoffrey R. Stone, *President Obama and Judicial Activism*, Huffington Post, http://www.huffingtonpost.com/geoffrey-r-stone/president-obama-and-judic_b_561798.html (posted May 3, 2010, 6:39 p.m. EDT). It is not clear to me that this inference is the correct one to draw.

3. Savage & Stolberg, *supra* n. 1 (referencing the decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010)).

4. *Id.*

5. *Id.*

happen to reflect perspectives in recent scholarship about constitutional law. This scholarship, all written by highly regarded liberal academics, offers a skeptical assessment of federal courts' value as problem solvers of complex social and economic matters. The pessimistic appraisal is most clearly and most often associated with the claim that affirmative constitutional litigation in the U.S. Supreme Court offered bleak prospects - a "hollow hope" - of fundamental social change.⁶ Scholars' calls for "judicial minimalism"⁷ and to take the constitution away from the courts⁸ strike a similar chord.

A trio of recent books - Martha Minow's *In Brown's Wake: Legacies of America's Educational Landmark*, Paul Frymer's *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*, and Julie Novkov's *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954* - brings fresh perspectives to the study of how courts, political actors, and a range of institutions have contributed to the nation's current mix of inequality and opportunity. Like earlier commentators, these authors recognize that court-based change is not a reliable tool of problem solving. Yet they also offer nuanced appraisals of how courts fit into policymaking; they emphasize judicial competencies as much as deficiencies. These books perpetuate neither the image of the activist judge who can transform the world through political activism, nor the myth of the jurist who avoids politics and mechanically "applies the law."⁹ Rather, these books invite readers to ponder the complex and interactive ways in which courts, lawmakers, and citizens move society forward, and push it back, toward an array of political outcomes.

Martha Minow's book breathes new life into *Brown v. Board of Education*.¹⁰ In *Brown's Wake* persuasively argues that the legacy of the landmark decision extends far beyond race. *Brown*, Minow teaches us, spurred movements for equality under law and democracy in society among a range of groups: immigrants, language minorities, religious minorities, girls, gays, persons with disabilities, and the poor. Minow provides a dazzling array of examples to demonstrate her thesis that *Brown's* democratizing impact extended far and wide. Indeed, this sprawling work traverses the domestic sphere and considers the global impact of the landmark case. She moves seamlessly from considering educational equality in Mississippi, Texas, and San Francisco, to pondering

6. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 39-40, 74-75, 93, 155-156, 336-343 (U. Chi. Press 2nd ed., 2008); compare with Michael Klarman, *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Racial Equality* 363-442, 463-468 (Oxford U. Press 2004).

7. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard U. Press 2001).

8. Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton U. Press 2000).

9. All recent nominees to the U.S. Supreme Court have pledged fealty to some version of restrained judging, in which judges avoid activism. During his confirmation hearing, Chief Justice Roberts famously claimed that judges should merely "call balls and strikes" rather than impose his own policy choices and preferred outcomes in cases. See Todd S. Purdum & Robin Toner, *Roberts Pledges He'll Hear Cases With 'Open Mind'*, N.Y. Times A1 (Sept. 12, 2005). In a similar vein, Justice Sonia Sotomayor, during her confirmation hearings, described her judicial philosophy as "simple: fidelity to the law." See Peter Baker & Neil A. Lewis, *Judge Focuses on Rule of Law at the Hearings*, N.Y. Times A1 (July 13, 2009) A judge's task was not "to make law" but to "apply the law," she said. *Id.* Sotomayor's statements describing her approach to judging occurred amid charges that she permitted politics and policymaking to play roles in judging; these charges were based, in part, on an address that Sotomayor delivered in which she referenced her ethnicity and gender (calling herself a "wise Latina").*Id.*

10. 347 U.S. 483 (1954).

the same issue in South Africa, Ireland, and the Czech Republic.¹¹

Brown has a rich legacy, but what has *Brown* wrought? Just the same as in the context of race and schools, the case's legacy is mixed - even contradictory - in the many other areas that it has touched. Practically speaking, courts, legislators, educators, and activists have translated the principle of equality in education for which *Brown* stands in a variety of ways, some of which are in tension with one another. Perspectives on what equality requires, permits, or encourages are inextricable from normative commitments about the thorniest social and educational policy issues of the day. The chief debate concerns a fundamental question: whether equality contemplates integration, or permits separation, that is, separate but equal education.¹²

Minow informs us that, over time, *Brown*'s equality principle, construed in different contexts and stretched to accommodate local needs, yielded inconsistent results. In many cities, students learn English through immersion programs, a form of language instruction that values the social integration of English language learners and native speakers. But equality yielded bilingual schools catered to the cultural needs of Somali immigrants in the Twins Cities, a Hebrew language charter school in New Jersey, and Arabic language schools in New York City. Advocacy groups for persons with disabilities harnessed *Brown* first to achieve integration, called mainstreaming in this context, and then to gain specialized instruction in separate spaces. Critics of New York's Harvey Milk High School for gay, lesbian, and transgendered students invoked *Brown*'s equality norm in a bid to shut it down.¹³

Minow's discussion of the reemergence of single-sex education in American education is highly engaging. Despite the U.S. Supreme Court's decision requiring the historically all-male Virginia Military Institute to admit women, Minow notes, public single-sex schools may well pass constitutional muster in the future.¹⁴ Meanwhile, under the administration of President George W. Bush, federal law began to accommodate and even encourage the growth of single-sex schools at the elementary and secondary levels.¹⁵ The number of single-sex classroom and charter schools has grown as a result. Feminists and civil rights leaders struggle to explain whether these developments are consistent with equality.

Minow highlights one reason for indeterminate interpretations of equality in education, whether among feminists who ponder the value of single-sex education or

11. For the classic consideration of the geopolitical context of *Brown*, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988); more recently, see Mary L. Dudziak, *Cold War Civil Rights* (Princeton U. Press 2000).

12. The *Brown* lawyers aspired to integration, Minow argues, but the decision never mandated it; after a relative brief period of court-order desegregation, recent precedents have found school desegregation plans that take race into account, even voluntary plans, constitutionally impermissible. See *Parents Involved in Community Schools. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

13. Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark*, ch. 3 (Oxford U. Press 2010).

14. *Id.* at 68.

15. Under Department of Education rules issued in 2006, it no longer is necessary for administrators to provide a comparable institution to students of the excluded sex. It is left to recipients of federal funds to assess whether single-sex schools are necessary to advance an important objective. See U.S. Dept. of Educ., *Secretary Spellings Announces More Choices in Single Sex Education: Amended Regulations Give Communities More Flexibility to Offer Single Sex Schools and Classes*, <http://www2.ed.gov/print/news/pressreleases/2006/10/10242006.html> (released Oct. 24, 2006).

civil rights advocates who consider the value of school choice. Social science studies purporting to show educational benefits of various pedagogies that turn on integration or separation have not painted a clear picture. Figures on all sides of educational controversies use and misuse studies to justify their versions of school equity.¹⁶

The nation's interest in accountability, demonstrated through a near-obsession with measuring achievement through standardized testing, also has influenced whether students of color, children with disabilities, English language learners, and others have the opportunity to learn alongside middle-class whites.¹⁷ Persistent racial achievement gaps on testing incentivize white flight from racially diverse schools. African-American and Hispanic students who attend schools where many students are impoverished suffer most when middle-class, white families flee from school system, Minow notes. These students of color are not disadvantaged because white students magically enhance school quality, she argues. Rather, white middle-class students and families bring to schools access to social networks and intellectual capital that poor students and families typically do not possess, at least not at the same rates as the white middle class.¹⁸

Paul Frymer's book, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*, complements Minow's work by offering an analysis of intergenerational economic stasis, union decline, and their relationship to racial hierarchy in society - including in the schools. In just over 200 pages, Frymer, a professor of political science and legal studies who analyzes labor and civil rights from an institutional perspective, packs a powerful intellectual punch. Unlike some scholars in recent years, he argues that "poor decisions and unwise tactics of labor leaders and their followers" do not explain the absence of a strong and racially diverse labor movement.¹⁹ Instead, Congress' bifurcated legislative approach to labor and civil rights issues, along with ill-conceived institutional structure and design, explain the poor fortunes of workers in twentieth-century America.

The federal government split questions of race and class when it passed the Wagner Act in 1935 and the Civil Rights Act in 1964, Frymer explains. According to Frymer, these two legislative acts, accompanied by two distinct regulatory agencies, separated the interests of blacks and labor and "institutionalized the race/labor divide." Civil rights historians have long noted that the Wagner Act permitted racial discrimination. Frymer emphasizes a downside of civil rights activists' use of Title VII of the Civil Rights Act to challenge systemic discrimination by labor unions. The courts integrated labor, but in the process, weakened the bargaining power of unions subject to lawsuits. Meanwhile, white workers fled unions and the Democratic Party. The Republican Party, fortified by racially aggrieved whites and union members, won elections and appointed members to the National Labor Relations Board who proceeded to further weaken the labor movement. Republicans on the EEOC also rolled back civil rights protections. With that, Frymer offers an "autopsy," as he terms it, of labor, civil

16. Minow, *supra* n. 12, at ch. 6; *see also id.* at 141-143.

17. *Id.* at 298-299.

18. *Ib.* at 393-394.

19. *See* Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* 2 nn. 5-8 (Princeton U. Press 2007) (citing Risa Lauren Goluboff, Robert Korstad, and Nelson Lichtenstein).

rights, and the Democratic Party.

While Frymer pushes back against scholars who, he asserts, heap blame upon the NAACP, labor organizations, and the workers themselves for their own misfortunes, he offers a provocative argument about public interest lawyers' roles in the decline of labor. He argues that civil rights lawyers' "disinterest" in class-based rights arguments results in part from their ties to "corporate power." These lawyers represent clients "pro bono," but the organizations in question can only do so because they receive financial backing from corporate firms. Consequently, these lawyers are "unwilling to confront economic power in any meaningful way."²⁰ Frymer's observations, which are not accompanied by citations or names of organizations, appear to relate to the post-1964 period and recent events. He does, however, briefly reference Fortune 500 companies' backing of civil rights lawyers' strategies in the University of Michigan affirmative action cases as an example of this phenomenon. Frymer's analysis is sobering. It calls to mind earlier claims about conflicts of interest between civil rights and clients.²¹

More of an effort ought to have been made to substantiate such a bold claim. The example he breezily references is likely off the mark. The entity that Fortune 500 Companies supported in the University of Michigan cases was the university itself, a client represented by a private law firm.²² The university did not stand in for, or claim to represent, the interests of minority or working-class communities in the manner that the "civil rights" or "public interest" bar did.²³ In fact, as Justice Clarence Thomas noted in his dissent in the law school case,²⁴ the law school's admissions criteria actually disadvantage minority and working class applicants; some commentators agreed.²⁵ On this account, the Fortune 500 companies and the law schools' defense of affirmative action averted a discussion of the systemic inequalities at the root of the American educational system. In the University of Michigan cases, the conflict of interest analysis was not as straightforward as Frymer suggests.

Nevertheless, Frymer's general point is very well taken: the prospect of corporate capture potentially imperils the public interest bar.²⁶ But capitalists are not the only culprits here. Frymer is not keen to admit it, but the public interest bar and activists

20. *Id.* at 7.

21. See Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976); see also Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. Pa. L. Rev. 1913 (2003).

22. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 Colum. L. Rev. 1436, 1463 (2005).

23. *Id.* at 1467.

24. See *Grutter v. Bollinger*, 539 U.S. 306, 349-378 (2003). For an analysis of Thomas's opinion that elaborates on this point, see Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: the Grutter v. Bollinger Opinion*, 7 U. Pa. J. Const. L. 787 (2005).

25. Brown-Nagin, *supra* n. 20, at 1436; see also Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113 (2003); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928 (2001).

26. The more recent discussion of corporate power potentially undermining public service related not to civil rights lawyers but to the Congressional Black Caucus. See Eric Lipton & Eric Lichtblau, *In Black Caucus, a Fund Raising Powerhouse*, N.Y. Times A1 (Feb. 13, 2010); but see Marin Cogan, *Congressional Black Caucus Rips New York Times Piece*, Politico, <http://www.politico.com/news/stories/0210/33142.html> (posted Feb. 18, 2010, 3:08 p.m. EST).

themselves always have made hard strategic and tactical choices - ones subject to question on grounds that they did not serve the best interest of their clients. Future Supreme Court Justice Louis Brandeis - known as the "people's lawyer" - deployed stereotypes about women's capabilities in order to win protective labor legislation for women, and he eventually, he hoped, for the labor movement. His strategy succeeded in *Muller v. Oregon*, in which the U.S. Supreme Court upheld a ten-hour workday for women.²⁷ Brandeis' advocacy helped to lay the foundation for the labor movement's demands for special protections on the job for all workers.²⁸ At the time, some women's leaders questioned the wisdom of Brandeis's *Muller* strategy because it further embedded the notion of women's difference into constitutional law, in particular, those based on women's childbearing and childrearing capacities.²⁹ The concept of women as the "second sex" has been difficult to expunge from culture, and even from the law,³⁰ and some still contend that Brandeis' *Muller* strategy aided the resistance. Moreover, to this day, feminists argue about the wisdom of women pursuing special rights or accommodations in the workplace.³¹ Such examples—when lawyers for political movements make bold and controversial decisions that potentially damage their clients' interests—span groups and periods. If we limit ourselves to the twentieth century alone, the women's, civil rights, and antipoverty movements illustrate the phenomenon. We need to embrace these fraught moments in the history of public interest lawyering, where advocates encountered difficulties in interactions with their own clients, not to mention the courts and legislators. They are teachable moments for scholars who study how advocates use the law to seek change, and for change agents themselves.

Julie Novkov's book, *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954*, tackles different subject matter from the other two selections, and adds a distinct dimension to the study of law, politics, and racial hierarchy. Novkov, a political scientist, studies the "political development . . . of racial orders" and the "institutionalization of white supremacy" at the state level.³² She considers Alabama's criminalization of interracial marriage and corresponding court battles to enforce and overturn bans against "miscegenation" in order to explain how the law "embeds" cultural and racial subordination. Novkov's abstract rhetorical frameworks, including references to "racial formation," "racial orders," and "culturally constructed elements of hierarchies" in the political development of states, will be familiar to specialists, if not to

27. 208 U.S. 412 (1908) (upholding statute limiting woman's workday in factories to ten hours per day on grounds of women's inferior physical capabilities and childbearing and childrearing functions).

28. Melvin Urofsky, *Louis D. Brandeis: A Life* ch. 9 (2009).

29. See e.g. Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 Colum. J. Gender & L. 1, 26-28 (2007).

30. *Id.* The most obvious example of a law that accommodates women's difference in the way that some find problematic is The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982) (providing that employment discrimination on the basis of "pregnancy, childbirth, and related medical conditions is sex discrimination for purposes of that Act.").

31. See Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 354 n.114 (1984-85); .

Mary F. Radford, *Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy*, 63 N.Y.U. L. Rev. 532, 606-608 (1988).

32. Julie Novkov, *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954* 5 (U. Mich. Press 2008). Novkov's approach borrows from the theory of Desmond King and Rogers Smith. *Id.* at 5-6.

a wider audience.³³

The most noticeable and welcome feature of Novkov's work is how well it captures dynamism in the law. *Burns v. State*,³⁴ an 1872 decision, provides the jumping off point for Novkov's discussion of state building through the regulation of interracial intimacy. In *Burns*, the Supreme Court of Alabama overturned state legislation criminalizing interracial marriage on grounds that it violated federal law (the Civil Rights Act of 1866).³⁵ From that point forward, however, the state contested the decision, including in its 1901 constitution. The constitution, organized around the principle of white racial purity, forbade the legislature to permit interracial marriage, as it threatened the white racial order. The state regulated miscegenation on grounds that marriage, or more particularly, the families that constituted them, were fundamental elements of the public order. Alabama jurisprudence developed in ways that defined and rationalized the white family as the primary organ of the state. The idea of an interracial family was a "logical and legal" contradiction in terms, according to Novkov.³⁶

The state punished miscegenation with two-to-seven year sentences in the state penitentiary, giving rise to the mountain of cases that comprise Novkov's study. Her impressive database consists of all reported miscegenation cases in Alabama from 1865 to 1970. (The U.S. Supreme Court's 1967 decision in *Loving v. Virginia* finally felled criminal prosecutions of miscegenation in Alabama and elsewhere).³⁷ Among other things, Novkov's discussion informs us that litigation over interracial sex bans often turned on questions of racial integrity; it reinforced a binary racial order, one into which "mulattoes" and Native Americans did not easily fit.³⁸ Defendants could argue that no offensive sex had occurred because the accused had not mated across racial boundaries; a defendant could claim a defense of whiteness, that is.³⁹ It comes as no surprise that relationships between black men and white women dominated the law reports; the state placed few burdens on white male access to black women.

Novkov hopes to offer lessons about race, gender, law, and the state, and a nuanced discussion of on-the-ground developments related to interracial intimacy emerges in her work. She is convincing on the point that projects like hers, focused on the state as opposed to the national level, have much to tell us. That said, most would not argue with the proposition that state actors in post-bellum Alabama embraced white supremacy. Novkov's case-by-case survey of anti-miscegenation litigation in the state after 1865 shows us the stages of the process. As important as her contribution is, Novkov's work could have been bolder. I wondered about the relative utility of bans against interracial intimacy to the institutionalization of white supremacy, as compared to peonage, disfranchisement, or Klan violence, for instance. Novkov's work might have

33. *Id.* at 5-6, 12-13.

34. 48 Ala. 195, 198-199 (Ala. 1872).

35. *Id.*

36. Novkov, *supra* n. 30, at 16, 44-48, 53-54.

37. *Id.* at 271-275, 282.

38. *Id.* at 108-147; cf. Ariela Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Harvard U. Press 2010).

39. Defendants asserted "property in whiteness." See Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993); see also Novkov, *supra* n. 30, at 118-119.

benefited from considering just how crucial bans against interracial intimacy were to white supremacy.⁴⁰

Novkov concludes by speculating about whether her study of bans against interracial marriage can enlighten contemporary discussions about same-sex marriage. While this discussion surely will distract readers who might prefer to draw their own conclusions from her careful analysis, Novkov, a political scientist, could hardly resist the pull to explore this live controversy.

All three works echo one point that Novkov makes in this discussion. Opponents of same sex marriage uniformly disclaim animus as a basis for their position, and courts that rule against recognition of same-sex marriage see the existing order as “pre-political” or “natural.” Each author emphasizes how certain inequities - in schools, in the economy, or in state construction of marriage and family relationships - are naturalized. Yet, the losers in the natural order are the “perennial losers,”⁴¹ subjects of discrimination and stigma historically and presently.

II

All of these authors bid readers to engage with inequality - not only because it is the just thing to do - but also because stratification costs all of us. A single sentence in Novkov’s book beautifully captures the idea. She writes: “Forgetting or refusing to remember, blinding ourselves to color, has consequences.”⁴² Minow makes the thought more concrete. She claims that we all lose when society is balkanized; social integration is important to employers and to a well-functioning democracy. By changing how we talk about *Brown*’s legacy - insisting that something was in it for virtually all of us rather than only for a narrow interest group - Minow hopes to reinvigorate the ideal of community despite differences.⁴³

Increasingly, however, social scientists emphasize the *costs* of diversity. Commentators claim that social cohesiveness *decreases* in diverse neighborhoods and schools.⁴⁴ Some question whether diversity increases productivity in the workplace.⁴⁵

40. Novkov mentions these other tools of white supremacist orders in passing. See Novkov, *supra* n. 30, at 8.

41. *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

42. Novkov, *supra* n. 30, at 2.

43. Minow, *supra* n. 12, at 393, 396, 403-407. This discussion has been a theme of Minow’s work. See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell U. Press 1991).

44. See e.g. Robert D. Putnam, E. Pluribus Unum: *Diversity and Community in the Twenty-First Century*, 30 Scandinavian Pol. Stud. 137 (2007); Lisa Delpit, *Other People’s Children: Cultural Conflict in the Classroom* (New Press 1996).

45. See Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 Wisc. L. Rev. 795, 827, 841-853 (2005) (“[u]nless the effects of diversity are well managed, miscommunication, and interpersonal conflict may increase leading to lower productivity and ultimately lower performance on profit”) (quoting Taylor Cox, Jr. & Carol Smolinski, U.S. Dept. Labor Glass Ceiling Commn., *Managing Diversity and Glass Ceiling Initiatives as National Economic Imperatives* (U.S. Dept. of Labor 1994) (available at http://digitalcommons.ilr.cornell.edu/viewcontent.cgi?article=1119&context=key_workplace)); David Orentlicher, *Diversity: A Fundamental American Principle*, 70 Mo. L. Rev. 777, 799-800 n.120 (2005) (“To be sure, the limited empirical evidence that is available paints a mixed picture about the value of diversity in the workplaces”); Briana L. Seagriff, *Keep Your Lunch Money: Alleviating Workplace Bullying with Mediation*, 25 Ohio St. J. on Dis. Res. 575, 578-580 (2010) (“As organizations reorganize and scout for collaborative leaders to manage diversity and work teams become more diverse, conflict increases”); Amy L. Wax, *Discrimination*

These negative analyses and outlooks on social integration merit closer consideration. Frymer's institutional analysis of inequality directly confronts these negative sentiments about diversity. Whereas equal protection jurisprudence and public commentators discuss inequality in terms of individual bad motive - we ask, is he a racist? - ⁴⁶ Frymer insists that readers focus on the idea that behaviors that create inequality - racism, in particular - are not irrational. Rather, such practices are strategic; they facilitate access to or help maintain power, wealth, and prestige in institutions.⁴⁷

Either way, the question we might ask ourselves going forward is how we can promote institutional configurations that encourage people who otherwise are competitors for scarce resources to invest in integration. In what ways can whites learn to see that their fates are tied to that of people of color, and vice versa? Minow's book mediates on this matter the most, yet she devotes less time discussing common understandings of equality that each slice of the larger community might invoke productively.⁴⁸

As I see it, four models emerge, and each has something to commend it, along with serious limitations. One approach is to place an emphasis on "universal," as opposed to targeted programs, such as race-specific programs, that have the potential to advance the interests of all. This, as President Obama has written, "isn't just good policy; it's also good politics."⁴⁹ Proponents of this approach advocate priorities such as universal health care, child-tax credits, living wages, charter schools, and other forms of school choice. Immediately obvious is the fact that so-called universalism does not avoid the contentiousness associated with targeted programs. The policy arguments are a shade different, but no less contentious or partisan.

A second and related approach emphasizes the building and fortifying of multi-racial organizations and coalitions. Frymer notes that notwithstanding the decline of the labor movement, one third of it is represented by people of color, and there are more people of color in labor organizations than in any civil rights organization.⁵⁰ These are eye-opening facts. Nevertheless, organizations and coalitions, even diverse ones, in and of themselves, are not politically meaningful. Organizations must employ goals and processes that can achieve just results. This approach can only be an initial step, prior to negotiation and combat with external political actors.

Third, some advocate discursive and educative practices and strategic alliances within institutions to promote institutional restructuring⁵¹ and "racial literacy."⁵² For

as *Accident*, 74 Ind. L.J. 1129, 1185 n.164 (1999) ("There simply is 'no systematic proof that diversity management programs decrease ethnic and gender tensions while increasing profits, productivity, and creativity.'").

46. *Washington D.C. v. Davis*, 426 U.S. 229 (1976); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); cf. Richard Thompson Ford, *The Race Card: How Bluffing about Bias Makes Race Relations Worse* (Picador 2009).

47. Frymer, *supra* n. 18, at 108.

48. Frymer is confident that "almost anyone can be induced to follow orders or change his or her behavior in a specific institutional context, whether through simple peer pressure or an effort to follow structured rules." Frymer, *supra* n. 18, at 127.

49. Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 247 (Crown Publishers 2006).

50. Frymer, *supra* n. 18, at 1-2.

51. See e.g. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative*

example, school administrators must create “cultures of achievement” for low-income, minority children and workplace managers must actively recruit diverse workers - across color, gender, language, and disability barriers - and show that they value their presence once they are in the workplace. These practices presuppose that people are willing to compromise across boundaries and learn, and they may well be; however, proponents must develop incentives that encourage institutional stakeholders to overcome self-interested behavior that underlies stratification.

Fourth, some emphasize approaches that seek to break down boundaries through social, cultural, and interpersonal exchange across lines of race, class, gender, and the like. Long-term, these methods might be most effective. But they may be the least susceptible to outside influence or manipulation. Consider, for example, that some commentators have suggested interracial marriage is the surest approach to ameliorating racial conflict in America.⁵³ This proposal might be correct, but no one would suggest that the state should promote interracial unions.⁵⁴ Or, take the less extreme example: interracial friendships, many of which begin in neighborhoods and schools. Neighborhoods are segregated. The U.S. Supreme Court has held that school districts cannot even voluntarily adopt school integration plans that might promote cross-racial exchange among school children.⁵⁵ Increasingly, individuals themselves must initiate cross-boundary exchanges. That observation takes us back to the law, however, for all such exchanges take place within its shadow.

III

The courts’ competence to address inequality roots each book’s discussion. Each work, in its own way, permits us to question scholarly narratives that emphasize judicial incompetence and counsel judicial restraint. The authors do not, in the main, tell tales of judicial heroism. One does not necessarily come away from these readings less pessimistic about the courts. But the combination of methodological approaches employed by these authors makes clear the variety of roles that courts can play in movements for political and social movements for equality.⁵⁶

Minow’s analysis of *Brown*’s legacy emphasized breadth. For Minow, *Brown* has endured in hundreds of different ways, even as the U.S. Supreme Court itself has chipped away at the case’s central premise as applied in the context of racial desegregation. Minow’s work maps the variety of stakeholders responsible for implementing *Brown*’s

Deal, 84 Cal. L. Rev. 953, 959 (1996) (discussing the need for a new paradigms for recruitment, selection, and promotion in order to enhance diversity); Susan Sturm, *Second Generation Employment Discrimination: a Structural Approach*, 101 Colum. L. Rev. 458 (2001) (suggesting a structural regulatory solution to the problem of second generation discrimination).

52. Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Harvard U. Press 2003).

53. See Michael Lind, *The Next American Nation: The New Nationalism and the Fourth American Revolution* 288-298 (Simon & Schuster 1996).

54. Latest figures show that the number of interracial marriages has declined; some argue that economic distress is a factor in peoples’ willingness to engage in exogenous marriage. Cf. Sam Roberts, *Black Women See Fewer Black Men at the Altar*, N.Y. Times A12 (June 4, 2010).

55. *Parents Involved in Community Schools*, 551 U.S. 701.

56. This perspective also expresses some of the themes that I explore in my own forthcoming work. Tomiko Brown-Nagin, *Courage to Dissent* (Oxford U. Press forthcoming 2011).

norm of equality over time. Notably, many of those people are legislators and other public officials; these individuals work with courts and with awareness of judicial decisions, not autonomously. This is true even when political rhetoric suggests otherwise, as some of the school finance cases show; legislators claim to disfavor court mandates, but over time, school funding levels rise.⁵⁷ Most recently, *Brown* has given rise to varieties of school choice; legal rules or standards established by courts long ago, or even present courts, may yet play a large role in determining which students get access to this programming.

Frymer's analysis emphasized depth in several institutional contexts. Far from discussing judicial incompetence, Frymer portrays the federal courts as "powerful and successful."⁵⁸ Judges achieved their objectives of integrating labor unions; for Frymer, the second-order problems that occurred in the labor movement as a result of Title VII litigation did not undermine the fact of judicial success. Frymer's analysis also reminds us to consider all of the institutions in which lawmaking occurs, courts, Congress, as well as regulatory agencies. Again, courts are not autonomous, but interactive.

Novkov offers an in-depth analysis of a single subject matter and state. Even as she concerns herself with how courts and law embed racism and inequality, Novkov stresses "openness in doctrinal development when legal institutions interact with social forces."⁵⁹ In her telling, the system is "porous" to culture, political developments, and legal argument.⁶⁰ Moreover, she *does* tell a story of judicial success. *Loving v. Virginia* effected fundamental social change. To be sure, timing was an important element of the decision's success, and enforcement was largely left to individuals rather than to state actors. Nonetheless, *Loving* doubtlessly represents a form of judicial success.⁶¹

CONCLUSION

Taken together, these three books, one from a law professor and two from political scientists, remind us that the analyses we offer about the law depend on our lens and our methodologies. It remains to be seen, however, whether public discourse about the work of the courts will ever become as nuanced as some of the scholarship. For now, it is fashionable to criticize "judicial activism" and praise "judicial restraint," notwithstanding the fact that these terms are easily manipulated. Meanwhile, judges are human; they operate in the real and dynamic world of modern constitutional law and they do not unerringly apply the same jurisprudential tools to each and every like case. Elected officials beacon the courts to strike down or rewrite statutes through faulty drafting, failure to address matters such as entrenched inequality, or by writing their prejudices and the preferences of special interests - including corporations - into the law.

57. See James E. Ryan, *Schools, Race, and Money*, 109 Yale L.J. 249 (1999).

58. Frymer, *supra* n. 18, at 129.

59. Novkov, *supra* n. 30, at 20.

60. *Id.*

61. See John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 How. L.J. 15, 18 (2007) (noting that "*Loving* is understood by most to be a 'landmark' case."); Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 Harv. Civ. Rights-Civ. Libs. L. Rev. 231, 237 (stating "the *Loving* decision has consistently been highlighted as a transformative case on race relations and a symbol of the steady breakdown of racial barriers in intimate and personal relationships.").

The vaunted “democratic process” lays the most controversial issues at the court’s feet.

I wonder what would happen if the American people had a more accurate picture of the courts and more realistic about the capacity of elected officials to address our thorniest social problems? Perhaps next on our agenda should be nuanced works about courts, politics, and inequality, like Minow, Frymer, and Navkov’s – but written for a general audience. Such accessible and nuanced works might help to inspire the fresh rhetorical frames and public conversations about law and society that we need, for a change.